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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 THOMAS MCCRACKEN, *et al.*,

8 Plaintiffs,

9 v.

10 REGIONAL TRANSPORTATION
11 COMMISSION OF SOUTHERN NEVADA, *et*
al.,

12 Defendants.

Case No. 2:16-cv-01920-RFB-GWF

ORDER

13
14 **I. INTRODUCTION**

15 Before the Court is Defendants Regional Transportation Commission of Southern Nevada
16 (“RTC”), M.J. Maynard, and Carl Scarbrough’s Motion to Dismiss the Amended Complaint. ECF
17 No. 33. Plaintiffs Thomas McCracken and CE Mobile Installs, LTD opposed the Motion, and
18 Defendants replied. ECF Nos. 37, 38.

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20 **II. PROCEDURAL BACKGROUND**

21 Plaintiffs sued Defendants on August 12, 2016. EFC No. 1. Defendants moved to dismiss
22 the original complaint on September 30, 2016. ECF No. 8. The Court entertained oral arguments
23 on the motion on May 9, 2017. ECF No. 20. At the hearing, the Court granted the motion in part,
24 dismissing Plaintiffs’ claim brought under Monell v. New York City Department of Social
25 Services, 436 U.S. 658, 690 (1978) with prejudice and Plaintiffs’ claims for First Amendment
26 retaliation without prejudice. Id. The Court also dismissed the state law claims for lack of
27 jurisdiction. Id.

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1 Plaintiffs moved for leave to file an amended complaint on May 23, 2017, which the Court
2 granted as to the First Amendment retaliation claims and the state-law claims. ECF Nos. 19, 31.
3 The Court emphasized that the Monell claim would not proceed. ECF No. 31. Plaintiffs'
4 Amended Complaint was filed on March 30, 2018, alleging the following claims: (1) Monell
5 violation against RTC; (2) First Amendment retaliation against RTC, Scarbrough, and Maynard in
6 their official capacities; (3) First Amendment retaliation against Scarbrough and Maynard in their
7 individual capacities; (4) breach of contract against all Defendants; (5) breach of covenant of good
8 faith and fair dealing against all Defendants; and (6) tortious interference with prospective
9 economic relations against all Defendants. ECF No. 32.

10 Defendants now move to dismiss the Amended Complaint. ECF No. 33. Plaintiffs
11 opposed the Motion, and Defendants replied. ECF Nos. 37, 38. The Court held a hearing on the
12 Motion on November 15, 2018. ECF No. 44.

13 14 **III. FACTUAL BACKGROUND**

15 The Amended Complaint alleges the following:

16 Plaintiff McCracken is an independent contractor, and Plaintiff CE Mobile is a Nevada
17 corporation. Plaintiffs began contracting with Defendant RTC, a political subdivision of the State
18 of Nevada, in July 2004. Under the contract, Plaintiffs provided installation and maintenance
19 services for security cameras and computer-aided dispatch equipment on RTC buses. McCracken
20 also served as an authorized dealer for Safety Vision, a company that sold equipment to RTC. In
21 his role as an authorized Safety Vision dealer, McCracken presented his own purchase orders and
22 installation packages directly to RTC via invoices when selling Safety Vision parts. He also
23 worked on RTC sites to provide Safety Vision installation services.

24 In April of each year, the RTC Board of Commissioners ("Board") approved the budget
25 for equipment and services publicly submitted by Plaintiffs. The funds were then awarded, set
26 aside, and earmarked for Plaintiffs to be paid once detailed invoices were received by RTC.
27 Plaintiffs subsequently provided RTC with invoices of purchase orders or of work, products,
28 installation, maintenance, warranties, and other customary and appropriate details for each

1 transaction. This course of dealing continued for twelve years, during which time Plaintiffs
2 completed all projects without issue and RTC paid all invoices without issue. Plaintiffs worked
3 directly with John Nevill, the prior RTC Manager of General Equipment, over the twelve years.

4 Then, on February 16, 2016, Nevill notified Plaintiffs that he was placed on administrative
5 leave and that Plaintiffs would now coordinate with Defendant Scarbrough. RTC began to pay
6 Plaintiffs' invoices late once Scarbrough took control.

7 McCracken met with Scarbrough multiple times in February and March 2016 to discuss
8 past-due invoices. McCracken knew how much money was preapproved for each work order since
9 the budget was passed at the start of the fiscal year. McCracken therefore questioned why the
10 earmarked funds were not available to pay the outstanding invoices. Scarbrough never provided
11 an answer; he instead demanded that Plaintiffs provide new information for each unpaid invoice,
12 stating the preapproved invoices were incomplete. RTC had never deemed Plaintiffs' invoices to
13 be incomplete during the parties' prior twelve-year relationship. But Plaintiffs acquiesced and
14 made the requested changes. Scarbrough then falsely informed Plaintiffs that the invoices were
15 scheduled to be paid the next time RTC issued vendor payments.

16 After not receiving payment, McCracken grew concerned that the preapproved funds were
17 no longer available to pay the outstanding invoices and that Defendants did not plan on remitting
18 payment. McCracken believed that Scarbrough was demanding additional information to avoid
19 paying Plaintiffs altogether or to build a case to terminate Plaintiffs' contract.

20 McCracken considered pursuing the outstanding invoices via collection services. He
21 emailed his concerns to an RTC employee that was "higher up [than Scarbrough on] the chain of
22 command." He also discussed the outstanding invoices and his concerns regarding the possibility
23 of nonpayment with other contractors, vendors, and people associated with RTC. He learned that
24 other vendors were experiencing issues with receiving timely payments from Scarbrough.

25 McCracken specifically discussed his concerns with Safety Vision employees in February
26 and May 2016, shortly after Safety Vision had recently signed a multi-million-dollar contract with
27 RTC. Safety Vision revealed that it had warned Scarbrough that RTC's credit terms were
28 approaching the limit, thereby risking RTC's credit rating. RTC paid Safety Vision thereafter.

1 Despite paying other vendors, RTC continued to refuse to pay Plaintiffs' invoices.
2 McCracken thus reached out to Nevill, who had been reassigned to a different RTC position.
3 McCracken shared his concern about nonpayment and his fear that the earmarked money may no
4 longer be available. He also shared his plan to pursue the outstanding invoices via collection
5 services.

6 Nevill then revealed that RTC's credit rating was recently raised. "This was critical, as
7 RTC was trying to raise bond money for the approved light-rail plan and an unfavorable credit
8 report would risk the bond money for the pre-approved plans." ECF No. 32 at 5. Nevill offered
9 to escalate McCracken's complaints to Tina Quigley, the RTC General Manager. In her position,
10 Quigley reported directly to the Board. McCracken agreed to refrain from seeking collecting
11 services based on the twelve-year relationship between Plaintiffs and RTC so that Nevill could
12 bring the issue to Quigley's attention.

13 By this time, McCracken "began to believe it was highly probable that RTC was
14 withholding payments to vendors in order to artificially inflate its credit rating" and that RTC was
15 attempting to avoid paying Plaintiffs entirely to bolster its credit ratings to obtain better bond
16 returns. Id. at 6. McCracken therefore emailed Defendant M.J. Maynard, the RTC Deputy General
17 Manager and Scarbrough's supervisor. He requested an in-person meeting.

18 McCracken met with Maynard on March 28, 2016. Maynard informed McCracken that
19 Scarbrough's department had been poorly managed by Nevill. McCracken expressed his concerns
20 regarding the nonpayment and the availability, or lack thereof, of the earmarked funds. Despite
21 the work being preapproved previously, Maynard demanded that McCracken further amend the
22 outstanding purchase orders and unpaid invoices to provide additional information. Maynard also
23 told McCracken that she would advise on what information was still needed. As of the date of the
24 Amended Complaint, she has failed to do so.

25 In approximately April 2016, Scarbrough and Maynard met with a Safety Vision agent.
26 They stated that they were dissatisfied with Plaintiffs since McCracken approached their superiors
27 about the management of department funds. Either Scarbrough or Maynard expressed that they,
28 "Don't see [Plaintiffs] in the future." When asked if their decision to terminate Plaintiffs' contract

1 was in response to Plaintiff pressing for payment of the outstanding invoices and for answers from
2 superior RTC officials about the availability of funds, neither Scarbrough nor Maynard denied it.

3 On April 13, 2016, Safety Vision informed McCracken that Scarbrough was extremely
4 angry at McCracken for speaking to his superiors about the unpaid invoices and allegations of
5 unavailable funds.

6 Then, on May 2, 2016, Defendants terminated Plaintiffs' contract and services with RTC.

7 8 **IV. LEGAL STANDARD**

9 In order to state a claim upon which relief can be granted, a pleading must contain "a short
10 and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P.
11 8(a)(2). In ruling on a motion to dismiss for failure to state a claim, "[a]ll well-pleaded allegations
12 of material fact in the complaint are accepted as true and are construed in the light most favorable
13 to the non-moving party." Faulkner v. ADT Security Servs., Inc., 706 F.3d 1017, 1019 (9th Cir.
14 2013). To survive a motion to dismiss, a complaint must contain "sufficient factual matter,
15 accepted as true, to state a claim to relief that is plausible on its face," meaning that the court can
16 reasonably infer "that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556
17 U.S. 662, 678 (2009) (citation and internal quotation marks omitted).

18 19 **V. DISCUSSION**

20 Plaintiffs assert federal claims against Defendants under 42 U.S.C. § 1983: (1) a Monell
21 claim and (2) two First Amendment retaliation claims. Section 1983 does not create substantive
22 rights but merely is a device for enforcing certain Constitutional provisions or federal statutes. See
23 Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617 (1979). The elements of a Section
24 1983 claim are: (1) violation of rights protected by the Constitution or created by federal statute,
25 (2) proximately caused (3) by conduct of a "person" (4) acting "under color of state law."
26 Crumpton v. Gates, 947 F.2d 1418, 1420 (9th Cir. 1991).

27 The Court dismisses Plaintiffs' Monell claim in accordance with its prior orders, which
28 previously dismissed the claim with prejudice. The Court therefore turns to Plaintiffs' First

1 Amendment retaliation claims, first addressing the sufficiency of the allegations and then
2 considering the issue of qualified immunity.

3 **a. First Amendment Retaliation Allegations**

4 To begin, “[c]itizens do not surrender their First Amendment rights by accepting public
5 employment.” Barone v. City of Springfield, Oregon, 902 F.3d 1091, 1101 (9th Cir. 2018)
6 (quoting Lane v. Franks, 134 S. Ct. 2369, 2374 (2014)). “Indeed, the public has an interest in
7 receiving the well-informed views of government employees engaging in civic discussion, because
8 government employees are in the best position to know what ails the agencies for which they
9 work.” Id. (internal quotations omitted).

10 “The First Amendment’s guarantee of freedom of speech protects government employees
11 from termination because of their speech on matters of public concern.” Bd. of Cty. Comm’rs,
12 Wabaunsee Cty., Kan. V. Umbehr, 518 U.S. 668, 675 (1996). The protections afforded to
13 government employees extend to independent contractors; the First Amendment prohibits the
14 termination of at-will government contracts in retaliation for the exercise of freedom of speech.
15 Id. at 675–80. The Ninth Circuit applies a sequential five-step inquiry, derived from Pickering v.
16 Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cty. Illinois, 391 U.S. 563, 568 (1968), to determine
17 if a plaintiff has alleged a First Amendment retaliation claim against a government employer:

18 (1) whether the plaintiff spoke on a matter of public concern; (2) whether the
19 plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff’s
20 protected speech was a substantial or motivating factor in the adverse employment
21 action; (4) whether the state had an adequate justification for treating the employee
differently from other members of the general public; and (5) whether the state
would have taken the adverse employment action even absent the protected speech.

22 Clairmont v. Sound Mental Health, 632 F.3d 1091, 1102–03 (9th Cir. 2011). The burden lies with
23 the Plaintiff on the first three steps but shifts to the government in the last two steps. Id. at 1103.

24 Here, the parties dispute whether the matter qualifies as public concern. “Whether a public
25 employee or contractor’s expressive conduct addresses a matter of public concern is a question of
26 law.” Alpha Energy Savers, Inc. v. Hansen, 381 F.3d 917, 924 (9th Cir. 2004). “Speech involves
27 matters of public concern when it can be fairly considered as relating to any matter of political,
28 social, or other concern to the community, or when it is a subject of legitimate news interest[.]”

1 Lane, 134 S. Ct. at 2380 (internal quotation marks and citation omitted). “[S]peech that deals with
2 individual personnel disputes and grievances and that would be of no relevance to the public’s
3 evaluation of performance of governmental agencies is generally not of public concern.” Turner
4 v. City & Cty. of San Francisco, 788 F.3d 1206, 1211 (9th Cir. 2015) (internal quotations omitted).

5 “Whether speech addresses a matter of public concern ‘turns on the content, form, and
6 context of the speech.’” Moonin v. Tice, 868 F.3d 853, 863 (9th Cir. 2017) (quoting Lane, 134 S.
7 Ct. at 2380). “[C]ontent is the greatest single factor in the ... inquiry.” Alpha Energy Savers, Inc.,
8 381 F.3d at 925. But “an employee’s motivation is relevant to the public-concern inquiry.” Turner,
9 788 F.3d at 1206; see also Desrochers v. City of San Bernardino, 572 F.3d 703, 715 (9th Cir. 2009)
10 (internal quotations omitted).

11 The Ninth Circuit has “framed that inquiry with two questions: Why did the employee
12 speak (as best as [the court] can tell)? Does the speech seek to bring to light actual or potential
13 wrongdoing or breach of public trust, or is it animated instead by ‘dissatisfaction’ with one’s
14 employment situation?” Turner, 788 F.3d at 1210. Thus, while speech “ostensibly could invoke
15 a matter of public concern,” it is not protected if it “[arises] primarily out of concerns for [the
16 plaintiff’s] own professional advancement [or internal grievances].” Id. Further, “[i]n a close
17 case, when the subject matter of a statement is only marginally related to issues of public concern,
18 the fact that it was made because of a grudge or other private interest or to co-workers rather than
19 to the press may lead the court to conclude that the statement does not substantially involve a
20 matter of public concern.” Desrochers, 572 F.3d at 710 (internal citations omitted).

21 The Court finds that Plaintiffs fail to allege that the at-issue speech is protected under the
22 First Amendment because the allegations, taken in the light most favorable to Plaintiffs, do not
23 establish that the speech constitutes a matter of public concern. The content of the at-issue speech
24 focuses on Plaintiffs’ desire to be paid for their services provided under the contract. While
25 Plaintiff mused and pondered whether RTC’s credit rating or misallocation of funds might have
26 contributed to the failure to pay the invoices, his speech was focused on procuring payment. Thus,
27 Plaintiffs’ speculation as to the reasons for RTC’s delayed payment is of no consequence, as
28 Plaintiffs’ actual speech arose primarily out of Plaintiffs’ concerns over the unpaid invoices owed

1 to them. That is McCracken spoke in order for Plaintiffs to be paid.

2 Further, the Court notes that Plaintiffs did not raise or threaten to raise in a public form any
3 allegation of RTC's purported misallocation of funds. While Plaintiffs discussed with other
4 vendors the issue of nonpayment, these conversations were focused on nonpayment and not
5 alleged financial misconduct by RTC. Because the at-issue speech was made to further Plaintiffs'
6 purely private interest of obtaining payment on past due invoices rather than for bringing to light
7 actual or potential wrongdoings, the Court finds the speech is not protected under the First
8 Amendment. The Court dismisses the First Amendment retaliation claims accordingly.

9 **b. Qualified Immunity**

10 Even if Plaintiffs adequately alleged that McCracken's speech constitutes a matter of
11 public concern, the Court finds that Defendants are entitled to qualified immunity. "The doctrine
12 of qualified immunity protects government officials from liability for civil damages insofar as their
13 conduct does not violate clearly established statutory or constitutional rights of which a reasonable
14 person would have known." Pearson v. Callahan, 555 U.S. 223, 231 (2009). Qualified immunity
15 is an immunity from suit rather than a defense to liability, and "ensures that officers are on notice
16 their conduct is unlawful before being subjected to suit." Tarabochia v. Adkins, 766 F.3d 1115,
17 1121 (9th Cir. 2014).

18 In deciding whether public officials are entitled to qualified immunity, courts consider,
19 taking the facts in the light most favorable to the nonmoving party, whether (1) the facts show that
20 the officer's conduct violated a constitutional right, and (2) if so, whether that right was clearly
21 established at the time. Id. Under the second prong, courts "consider whether a reasonable
22 [government official] would have had fair notice that the action was unlawful." Id. at 1125
23 (internal quotation marks omitted). While a case directly on point is not required for a right to be
24 clearly established, "existing precedent must have placed the statutory or constitutional question
25 beyond debate." Ashcroft v. al-Kidd, 131 S.Ct. 2074, 2083 (2011). This ensures that the law has
26 given officials "fair warning that their conduct is unconstitutional." Ellins v. City of Sierra Madre,
27 710 F.3d 1049, 1064 (9th Cir. 2013). Further, the right must be defined at "the appropriate level
28 of generality[;] [the court] must not allow an overly generalized or excessively specific

1 construction of the right to guide [its] analysis.” Cunningham v. Gates, 229 F.3d 1271, 1288 (9th
2 Cir. 2000); see also al-Kidd, 131 S.Ct. at 2084. The plaintiff bears the burden of proving that the
3 right was clearly established. Id. at 1125.

4 The Court finds that Scarbrough and Maynard are entitled to qualified immunity because
5 Plaintiffs have not made out a constitutional violation of a clearly established right. While the law
6 clearly establishes a right for independent contractors contracting with the government to be free
7 from retaliation after taking part in protected speech, Umbehr, 518 U.S. at 675–80, the protected
8 speech must regard a matter of public concern and be made in the contractor’s capacity as a private
9 citizen, Clairmont, 632 F.3d 1102–03.

10 McCracken initially complained solely about the untimely payments of Plaintiffs’ invoices
11 and only later hypothesized to other vendors that the earmarked funds were no longer available in
12 light of the continual nonpayment. His speech therefore focused on his private interest of being
13 paid and was made in his capacity as a quasi-public employment rather than his capacity as a
14 private citizen. Moreover, there is no allegation that RTC officials were aware or made aware of
15 any alleged conversations between the Plaintiffs and other vendors. Because of the nature of
16 McCracken’s communications with the RTC regarding nonpayment of invoices, a reasonable
17 government official would not have fair notice that the speech later transformed into matters
18 considered public concern based on McCracken’s own speculation that earmarked funds may not
19 be available. This is especially so given that three of Plaintiffs’ own allegations contradict
20 McCracken’s hypothesis: (1) RTC officials required additional information to detail the work for
21 which Plaintiffs’ were invoicing; (2) detailed invoices were always required but later enforced
22 after Scarbrough replaced Nevill; and (3) other RTC vendors were paid after complaining of
23 untimely payments.

24 Plaintiffs point to two cases to oppose the award of qualified immunity: O’Brien v. Welty,
25 818 F.3d 920, 936 (9th Cir. 2016) and Alpha Energy Savers, Inc. v. Hansen, 381 F.3d 917, 926
26 (9th Cir. 2004). O’Brien, however, does not address the requirement that a government
27 employee’s speech cover an issue of public concern; the case instead applied First Amendment
28 protections to a private citizen who spoke critically of a university rather than a government

1 employer. Thus, O'Brien is inapplicable. Likewise, Alpha Energy Savers acknowledges that
2 “speech that deals with individual personnel disputes and grievances and that would be of no
3 relevance to the public’s evaluation of the performance of government agencies, is generally not
4 of public concern.” 381 F.3d at 924 (internal quotations omitted). Alpha Energy Savers then
5 focused on the content of the at-issue speech. Id. The content of McCracken’s speech regarded
6 Plaintiffs’ unpaid invoices and then later evolved to include his speculation that the invoices were
7 not being paid due to the unavailability of previously earmarked funds. But as explained *infra*,
8 Plaintiffs allegations demonstrate the content was merely speculation as to why Plaintiffs’ personal
9 grievances were not remedied. The Court therefore finds that Scarbrough and Maynard are entitled
10 to qualified immunity.

11
12 **VI. CONCLUSION**

13 **IT IS THEREFORE ORDERED** that Defendants Motion to Dismiss is **GRANTED**.
14 The Court dismisses Plaintiffs’ Monell claim and First Amendment claims and instructs the Clerk
15 of the Court to enter judgment in favor of Defendants accordingly.

16 **IT IS FURTHER ORDERED** that the Court declines to exercise supplemental
17 jurisdiction over the remaining state-law claims under 28 U.S.C. § 1367(c)(3) and dismisses them
18 without prejudice. Thus, the Court of the Clerk is instructed to close this matter accordingly.

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20 DATED: February 19, 2019.

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23 **RICHARD F. BOULWARE, II**
24 **UNITED STATES DISTRICT JUDGE**
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